Supreme Court, U.S.
FILED

09-568 NOV 6 - 2009

OFFICE OF THE CLERK

No. 09-

IN THE

Supreme Court of the United States

MAREMONT CORPORATION,

Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of HAROLD ST. JOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN C. CANONI
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
JAMES P. YOUNG
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 6, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Third Circuit erred in holding that a defendant waived its right to remove a diversity case to federal court where the defendant filed a notice of removal less than six hours after the unexpected dismissal of the only non-diverse co-defendant and the brief delay was explained by defendant's need to confirm the removability of the case.

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, the following parties were defendants below:

Affinia Group, Inc.
Arvin Industries, Inc.
Borg-Warner Morse TEC
Bosch Braking Systems Corp.
Brake Parts, Inc.
Carlisle Companies, Inc.
Chrysler Motors, LLC
Dana Corp.
EIS Brakes
Ford Motor Co.
General Motors Corp.
Honeywell International, Inc.
National Automotive Parts Association
National Gasket Co.
Pneumo-Abex, LLC
Toyota Motor Sales, USA, Inc.
Trane US, Inc.
Western Auto Supply Co.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Maremont Corporation states that ArvinMeritor, Inc. is its parent corporation and owns 100% of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	7
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS	7
II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL	13
III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE	18
CONCLUSION	22
APPENDIX	
APPENDIX A: *Florence Diane St. John* v. *Affina Group, Inc.*, No. 09-2573 (3d Cir. Sept. 3, 2009) (remand order)	1a

APPENDIX B: *Florence Diane St. John* v. *Affina Group, Inc.*, No. 09-2501, 2009 U.S. Dist LEXIS 47787 (D.N.J. June 8, 2009) (granting stay) 2a

APPENDIX C: *Florence Diane St. John* v. *Carlisle, Inc.*, No. 09-cv-2501 (D.N.J. May 29, 2009) (remand order) 9a

APPENDIX D: *Florence Diane St. John* v. *Affina Group, Inc.*, No. 09-2573 (3d Cir. Oct. 8, 2009) (order denying rehearing and rehearing en banc) 11a

TABLE OF AUTHORITIES

CASES Page

Akin v. *Ashland Chem. Co.*, 156 F.3d 1030 (10th Cir. 1998) 10, 11
Al-Hilfy v. *Rexnord Indus., LLC*, 2008 WL 4610022 (D. Neb. Oct. 15, 2008) 8
Aqualon Co. v. *MAC Equip., Inc.*, 149 F.3d 262 (4th Cir. 1998) 7
Arthur L. Christoffersen Irrevocable Trust v. *Yellow Book USA, Inc.*, 2006 WL 2925655 (N.D. Iowa Oct. 11, 2006) 8
Barabin v. *Albany Int'l Corp.*, 2007 WL 4376181 (W.D. Wash. Dec. 12, 2007) 8, 12
Bedell v. *H.R.C. Ltd.*, 522 F. Supp. 732 (E.D. Ky. 1981) 8
Buckhannon Bd. & Care Home, Inc. v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) 13
Carlsbad Tech. Inc. v. *HIF Bio, Inc.*, 129 S. Ct. 1862 (2009) 6, 19
Cavadi v. *Bank of Am., N.A.*, 2007 WL 3226166 (D.N.H. Oct. 30, 2007) 8, 10
Cooper Indus., Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) 13
DRI Mark Prods., Inc. v. *Meyercord Co.*, 194 F. Supp. 536 (S.D.N.Y. 1961) 9
Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207 (3d Cir. 2007) 17
Ellis v. *Coventry Capital I LLC*, 2008 WL 4396349 (N.D. Ill. Sept. 24, 2008) 8
Forrester v. *Penn Lyon Homes, Inc.*, 553 F.3d 340 (4th Cir. 2009) 17
Foster v. *Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991) 9
Grievance Adm'r v. *Fieger*, 409 F. Supp. 2d 858 (E.D. Mich. 2005) 8

TABLE OF AUTHORITIES – continued

Page

Grubb v. *Donegal Mut. Ins. Co.*, 935 F.2d 57 (4th Cir. 1991) 10, 11, 16
Guar. Trust Co. v. *York*, 326 U.S. 99 (1945) 14
Health Care Serv. Corp. v. *Pollitt*, 78 U.S.L.W. 3050 (U.S. Oct. 13, 2009) 18
Heniford v. *Am. Motors Sales Corp.*, 471 F. Supp. 328 (D.S.C. 1979) 12, 15
Hernandez-Lopez v. *Commonwealth of P.R.*, 30 F. Supp. 2d 205 (D.P.R. 1998) 8
Jerome B. Grubart, Inc. v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) ... 14
Johnson v. *Celotex Corp.*, 701 F. Supp. 553 (D. Md. 1988) 12, 15
Louis Trauth Dairy LLC v. *Risers Corp.*, 2002 WL 31951268 (S.D. Ohio Dec. 10, 2002) 8
Mattel, Inc. v. *Bryant*, 441 F. Supp. 2d 1081 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006) 8, 10
McNutt v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936) 19
Mercury Constr. Co. v. *Moses H. Cone Mem'l Hosp. (In re Mercury Constr. Corp.)*, 656 F.2d 933 (4th Cir. 1981), *aff'd on other grounds*, 460 U.S. 1 (1983) 17
Miranda v. *Rodriguez*, 2009 WL 32746 (M.D. Ga. Jan. 2, 2009) 8
Murphy Bros. v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) 19
Nicholas v. *KBR, Inc.*, 565 F.3d 904 (5th Cir. 2009) 17
Nungesser v. *Bryant*, 2007 WL 4374022 (D. Kan. Dec. 7, 2007) 8, 10

TABLE OF AUTHORITIES – continued

Page

O'Keefe v. *State Farm Fire & Cas. Co.*, 2009 WL 95039 (S.D. Miss. Jan. 13, 2009) 8

Oster v. *Standard Life Ins. Co.*, 2009 WL 1260174 (N.D. Cal. May 6, 2009) 8

Petroleum Pipe Ams. Corp. v. *Jindal Saw, Ltd.*, 575 F.3d 476 (5th Cir. 2009) 17

Powerex Corp. v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007) 19

Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 19

Regis Assocs. v. *Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193 (6th Cir. 1990) 7, 12, 13, 14

Resolution Trust Corp. v. *Bayside Developers*, 43 F.3d 1230 (9th Cir. 1995) .. 7

Roper v. *Saxon Mortgage Servs., Inc.*, 2009 WL 1259193 (N.D. Ga. May 5, 2009) 8

Rosenthal v. *Coates*, 148 U.S. 142 (1893) 16

Rothner v. *City of Chi.*, 879 F.2d 1402 (7th Cir. 1989) ..... *passim*

Rush v. *Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985) 18

Schoen v. *Presbyterian Health Plan, Inc.*, 2009 WL 1299680 (D.N.M. Feb. 19, 2009) 8

Snapper, Inc. v. *Redan*, 171 F.3d 1249 (11th Cir. 1999) 7

Stewart v. *W. Va. Employers' Mut. Ins. Co.*, 2009 WL 2599306 (S.D. W. Va. Aug. 20, 2009) 8

Swan v. *Cmty. Relations-Soc. Dev. Comm'n*, 374 F. Supp. 9 (E.D. Wis. 1974) 8

Tedford v. *Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003) 7, 16

TABLE OF AUTHORITIES – continued

Page

Things Remembered, Inc. v. *Petrarca*, 516 U.S. 124 (1995) 19
Vandeventer v. *Guimond*, 494 F. Supp. 2d 1255 (D. Kan. 2007) 10
Weltman v. *Silna*, 879 F.2d 425 (8th Cir. 1989) 12
Whitten v. *Michelin Am. Research & Dev. Corp.*, 2006 WL 1645833 (W.D. Tenn. June 8, 2006) 8
Wis. Dep't of Corr. v. *Schacht*, 524 U.S. 381 (1998) 19

STATUTES

9 U.S.C. §§ 1 *et seq.* 17
28 U.S.C. § 1332 1
§ 1441 1
§ 1446 ..... 15, 21
§ 1447 6

RULE

Sup. Ct. R. 10 7

LEGISLATIVE HISTORY

H.R. Rep. No. 100-889 (1988) 14, 19, 20

SCHOLARLY AUTHORITIES

16 James W. Moore, *Moore's Federal Practice* (3d ed. 2009) 8, 10
E. Farish Percy, *Making A Federal Case Of It: Removing Civil Cases To Federal Court Based On Fraudulent Joinder*, 91 Iowa L. Rev. 189 (2005) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioner Maremont Corporation respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals, Pet. App. 1a, is unreported. Its decision denying the petition for rehearing and rehearing en banc, Pet. App. 11a, is unreported. The order of the district court, Pet. App. 9a-10a, is unreported. The district court's decision granting a stay of its order pending appeal, Pet. App. 2a-8a, is reported at 2009 U.S. Dist. LEXIS 47787.

JURISDICTION

The court of appeals issued its order on September 3, 2009. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on October 8, 2009. *Id.* at 11a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332, which provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –
>
> (1) citizens of different States; ...

28 U.S.C. § 1441, which provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State

> court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

The decision below conflicts with decisions of other courts of appeals on the legal standard that governs whether a defendant, through conduct in the state court litigation, has waived the statutory right to remove a case to federal court. While other federal courts have held that any such litigation-based waiver must be "clear and unequivocal," the Third Circuit held that petitioner waived its removal rights in a situation where petitioner clearly and unequivocally *asserted and pursued* its right to a federal forum by investigating the basis for and seeking removal within six hours of first becoming aware of the possible ground for removal. This decision simply cannot be squared with a defendant's statutory entitlement to remove diversity cases to federal court and the purposes of federal diversity jurisdiction. In addition, this decision presents an issue of national importance because of the need to

ensure that the standard for waiver is applied evenly across the country and to ensure that defendants in cases that become removable due to changed circumstances during litigation are not deprived of the right Congress expressly granted them to a federal forum.

A. Factual Background.

This case is a claim for personal injuries arising from Harold St. John's alleged exposure to asbestos. The action was commenced on June 19, 2008 against Maremont and several other defendants in the Superior Court of New Jersey, Middlesex County. Because complete diversity did not exist among the defendants when the case was filed, Maremont did not attempt to remove the case to federal court.

The case proceeded to trial and the parties appeared for jury selection on May 26, 2009. Before jury selection commenced, at approximately 9:00 a.m., plaintiff's counsel announced that plaintiff had reached a settlement with co-defendant Honeywell, a company headquartered in New Jersey, and the court dismissed Honeywell from the action. Maremont then realized for the first time that the case was potentially removable because it appeared that none of the remaining defendants was either incorporated in New Jersey or had its headquarters there, thus creating complete diversity.

Maremont spent the next few hours confirming that complete diversity existed (an investigation that Maremont was obligated to perform by Fed. R. Civ. P. 11) and that review was not completed until 12:50 p.m. Maremont then attempted to obtain the consent of all remaining defendants for removal. At 2:54 p.m., less than six hours after it first learned the surprising news that a basis for removal possibly

existed, Maremont electronically filed a Notice of Removal ("Notice") with the United States District Court for the District of New Jersey and then filed the Notice with the state court clerk at 2:59 p.m. The time-stamped Notice was then served upon the state court judge and all of the parties at the trial.

During this time, jury selection proceeded in the state trial court. When Maremont's trial counsel learned after lunch that Maremont would file for removal, he remained in the courtroom but did not ask for any strikes for cause. After the notice of removal was filed, the state trial court continued with jury selection. Maremont's trial counsel remained in the courtroom but did not ask for any peremptory strikes; the court deemed his nonparticipation in the peremptory strike process to indicate that he was "passing" or accepting the jurors. A complete jury was not selected that day (and the partial jury was released several days later).

B. Proceedings Below.

The next day, May 27, 2009, plaintiff filed in the district court a proposed order requiring Maremont to show cause why the matter should not be remanded to the state court. At 2:00 p.m., less than two and one-half hours after Maremont was served with plaintiff's papers and without any opportunity to file a written response, the Honorable William J. Martini, U.S.D.J., conducted a conference call with all the parties and the state judge. During this call, Judge Martini announced that he would remand the matter and issued a remand order on May 29, 2009. Pet. App. 9a-10a.

Maremont promptly filed a notice of appeal of the remand order in the Third Circuit and also asked the district court to stay its remand order pending the

appeal. The district court granted the stay. Pet. App. 2a-8a. In its written order on the stay motion, the district court discussed the basis for its remand order. It explained that the removal was "jurisdictionally proper" on diversity grounds, but that it had remanded the case based on a finding that Maremont had waived its right to remove the case by "proceed[ing] with trial in state court" while "simultaneously preparing to remove the case to federal court." *Id.* at 5a. The district court found that it was "incumbent upon Defendants to notify the state court and ask for a brief adjournment as soon as they began contemplating removal. Even if their request had been denied, merely asking would have preserved the right." *Id.* at 7a. By "not tell[ing] the state court of its plans until six hours later," the district court concluded, defendants were able to "evaluate the potential jury pool and then decide whether or not to remove." *Id.*

On June 25, 2009, prior to any briefing on the appeal, plaintiff filed a motion in the Third Circuit to remand the case to the state court or, in the alternative, to dismiss the appeal, arguing that (1) Maremont's removal was procedurally defective because the Notice lacked certain attachments; and (2) the Third Circuit lacked jurisdiction to review the remand order. Plaintiff had not raised the first issue in the district court and, as a result, the district court never addressed it. As to the second issue, the district court specifically concluded in its order granting the stay pending appeal that its remand order was reviewable on appeal. Pet. App. 5a (finding that 28 U.S.C. § 1447 "does not preclude review of an order that was based upon a court's discretionary decision to remand a case" and citing *Carlsbad Tech. Inc.* v. *HIF Bio, Inc.*, 129 S. Ct. 1862, 1867 (2009)).

After briefing, but without hearing argument, the motions panel issued an order on September 3, 2009 (the "Third Circuit Remand Order"), Pet. App. 1a, which granted the plaintiff's motion "to the extent that, for essentially the reasons provided by the District Court, this matter is REMANDED to the Superior Court of New Jersey, Middlesex County, for further proceedings."[1] As noted, the sole basis on which the district court remanded the case was its finding that Maremont had waived its right to remove the case to federal court. Accordingly, the Third Circuit's Remand Order summarily affirmed the district court's waiver ruling. By virtue of this disposition based on plaintiff's motion, however, the Third Circuit resolved Maremont's appeal without ever giving it the opportunity to brief its challenges to the district court's waiver ruling.[2]

The Third Circuit denied rehearing and rehearing en banc, and also denied Maremont's motion to stay the mandate pending the filing of this petition. The state trial court has assigned a new trial date of January 19, 2010.

---

[1] The Third Circuit also denied as moot Maremont's motion to expand the record on appeal to include a transcript of the proceedings in the state court on May 26, 2009, the day that Maremont removed the case. Pet. App. 1a.

[2] In remanding the case, the Third Circuit correctly rejected the plaintiff's alternative argument that it should dismiss the appeal for lack of jurisdiction. *Carlsbad Tech., Inc.*, 129 S. Ct. 1862. In *Carlsbad*, this Court expressly held that 28 U.S.C. § 1447(d) does not bar appellate review of a remand order based upon a district court's "purely discretionary" decision to remand a case. *Id.* at 1866. As the district court acknowledged, it ordered a remand "on the grounds of waiver [as] an exercise of discretion." Pet. App. 5a-6a. Accordingly, the remand order in this case falls squarely within the class of orders that this Court found in *Carlsbad* to be subject to appellate review.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision below merits review because it conflicts with the decisions of other courts of appeals. See Sup. Ct. R. 10(a) (a consideration favoring review on certiorari is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"). The Third Circuit Remand Order affirmed the district court's ruling that Maremont waived its right to removal, Pet. App. 1a; no other court of appeals would find waiver in the circumstances posed in this case.

Under the removal statute, a defendant is "entitled to have [a] suit removed to a proper federal court as a matter of right," and "[i]f the requirements of the removal statute are met, the right to removal is absolute." *Regis Assocs.* v. *Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990). Although the right to removal, like virtually all other rights, can be waived, other courts of appeals that have considered the question uniformly have held that mere participation in the state court litigation does not constitute a waiver – instead, the defendant must specifically waive its right to removal in a "clear and unequivocal" manner. See, *e.g.*, *Tedford* v. *Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003) ("A waiver of the right to remove must be clear and unequivocal; the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits."); *Snapper, Inc.* v. *Redan*, 171 F.3d 1249, 1260-61 (11th Cir. 1999); *Aqualon Co.* v. *MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *Resolution Trust Corp.* v.

Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1995); *Rothner* v. *City of Chi.*, 879 F.2d 1402, 1415 (7th Cir. 1989); see also 16 James W. Moore, *Moore's Federal Practice* § 107.18[3][a] (3d ed. 2009) (a defendant's "intent to waive the right to remove to federal court and to submit to state court jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove").[3]

---

[3] Numerous district courts, in these circuits as well as other circuits, also have adopted the "clear and unequivocal" standard for determining whether a defendant waived its right to removal through its conduct in state court litigation. *See, e.g.*, *Stewart* v. *W. Va. Employers' Mut. Ins. Co.*, 2009 WL 2599306, at *3-4 (S.D. W. Va. Aug. 20, 2009); *Oster* v. *Standard Life Ins. Co.*, 2009 WL 1260174, at *1 (N.D. Cal. May 6, 2009); *Roper* v. *Saxon Mortgage Servs., Inc.*, 2009 WL 1259193, at *1 (N.D. Ga. May 5, 2009); *Schoen* v. *Presbyterian Health Plan, Inc.*, 2009 WL 1299680, at *6 (D.N.M. Feb. 19, 2009); *O'Keefe* v. *State Farm Fire & Cas. Co.*, 2009 WL 95039, at *8 (S.D. Miss. Jan. 13, 2009); *Miranda* v. *Rodriguez*, 2009 WL 32746, at *1 (M.D. Ga. Jan. 2, 2009); *Al-Hilfy* v. *Rexnord Indus., LLC*, 2008 WL 4610022, at *2 (D. Neb. Oct. 15, 2008); *Ellis* v. *Coventry Capital I LLC*, 2008 WL 4396349, at *4 (N.D. Ill. Sept. 24, 2008); *Barabin* v. *Albany Int'l Corp.*, 2007 WL 4376181, at *2 (W.D. Wash. Dec. 12, 2007); *Nungesser* v. *Bryant*, 2007 WL 4374022, at *9 (D. Kan. Dec. 7, 2007); *Cavadi* v. *Bank of Am., N.A.*, 2007 WL 3226166, at *2 (D.N.H. Oct. 30, 2007); *Arthur L. Christoffersen Irrevocable Trust* v. *Yellow Book USA, Inc.*, 2006 WL 2925655, at *3 (N.D. Iowa Oct. 11, 2006); *Whitten* v. *Michelin Am. Research & Dev. Corp.*, 2006 WL 1645833, at *3 (W.D. Tenn. June 8, 2006); *Mattel, Inc.* v. *Bryant*, 441 F. Supp. 2d 1081, 1091 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006); *Grievance Adm'r* v. *Fieger*, 409 F. Supp. 2d 858, 861 (E.D. Mich. 2005); *Louis Trauth Dairy LLC* v. *Risers Corp.*, 2002 WL 31951268, at *1 (S.D. Ohio Dec. 10, 2002); *Hernandez-Lopez* v. *Commonwealth of P.R.*, 30 F. Supp. 2d 205, 209 (D.P.R. 1998); *Bedell* v. *H.R.C. Ltd.*, 522 F. Supp. 732, 738 (E.D. Ky. 1981); *Swan* v. *Cmty. Relations-Social Dev. Comm'n*, 374 F. Supp. 9,

The Third Circuit's holding in this case, however, represents a clear departure from the legal standards applied by other courts of appeals.[4] The district court's "reasons" for finding waiver that the Third Circuit adopted made no mention of the "clear and unequivocal" standard, and the district court and the Third Circuit clearly did not apply that standard. Maremont plainly did not waive its right to removal in a "clear and unequivocal" manner. To the contrary, its conduct during the six hours that are at issue in this case revealed a "clear" and "unequivocal" intent to *assert* its removal rights: after first learning that the last remaining non-diverse defendant had settled, Maremont scrambled to prepare and file a notice of removal.

The Third Circuit nevertheless held that Maremont waived its right to removal based solely on the fact that it did not affirmatively tell the state court that morning that it might file a notice of removal later that day. This harsh outcome converts the waiver doctrine into a trap for the unwary and is squarely at odds with the "clear and unequivocal" standard applied by other courts of appeals. Those courts have recognized that important statutory rights cannot be forfeited by mere inadvertence; forfeiture requires actions that are knowing and voluntary and that manifest a clear intent to relinquish – not pursue – the federal forum.

11-12 (E.D. Wis. 1974); *DRI Mark Prods., Inc.* v. *Meyercord Co.*, 194 F. Supp. 536, 537 (S.D.N.Y. 1961).

[4] The Third Circuit's departure is particularly disturbing because it previously seemed to recognize the principles adopted by the other circuits. *See Foster* v. *Chesapeake Ins. Co.*, 933 F.2d 1207, 1217 n.15 (3d Cir. 1991). The court of appeals' finding of waiver in this case, however, indicates that *Foster* is no longer controlling in the Third Circuit.

Moreover, the Third Circuit's holding also conflicts with the holdings of other courts of appeals and lower federal courts that there can be no waiver until it is "unequivocally apparent" that the case is removable. See, *e.g.*, *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (defendant's actions in state court did not constitute waiver because they "were taken before it was unequivocally apparent that the case was removable"); *Vandeventer* v. *Guimond*, 494 F. Supp. 2d 1255, 1261-62 (D. Kan. 2007); *Cavadi* v. *Bank of Am., N.A.*, 2007 WL 3226166, at *2 (D.N.H. Oct. 30, 2007); *Nungesser* v. *Bryant*, 2007 WL 4374022, at *9 (D. Kan. Dec. 7, 2007); *Mattel, Inc.* v. *Bryant*, 441 F. Supp. 2d 1081, 1091 (C.D. Cal. 2005), *aff'd*, 446 F.3d 1011 (9th Cir. 2006); see also 16 *Moore's, supra* § 107.18[3][a] (it "must be unequivocally apparent that the case is removable" before a defendant can waive its right to remove). In contrast to these courts, the Third Circuit found waiver here, notwithstanding that much of the "delay" between the time Maremont learned that Honeywell had settled and the time it removed the case was attributable to Maremont's contacting other counsel to confirm that all other defendants were in fact diverse. Until Maremont completed this investigation a few hours later, the removability of the case was anything but "unequivocally apparent."

The divergent legal standards applied by the Third Circuit and other circuits have produced inconsistent outcomes on similar facts. In particular, the Third Circuit's finding of waiver in this case is squarely at odds with the outcomes of cases in other circuits in which a defendant's mere participation in state court proceedings has not been found to constitute waiver. For example, in *Grubb* v. *Donegal Mutual Insurance Co.*, 935 F.2d 57, 58-59 (4th Cir. 1991) – a case that

bears pertinent similarities to this one – the Fourth Circuit found no waiver where the state court dismissed the only non-diverse defendant at the outset of a summary judgment hearing and the remaining defendant participated in the hearing and did not file a notice of removal until a later date. The Fourth Circuit rejected the argument that the remaining defendant waived its right to removal by failing to assert that right "immediately" upon the dismissal and instead participating in the hearing, finding that the defendant's conduct at the hearing "did not show a 'clear and unequivocal' intent to waive its rights," particularly because the defendant's counsel "did not go to the hearing with any knowledge" that a possible basis for removal unexpectedly would arise. *Id.*

Similarly, in *Rothner*, the Seventh Circuit found no waiver after a defendant fully participated in a TRO hearing in a case that squarely raised a federal constitutional question and did not file for removal until almost a *week* later. *Rothner*, 879 F.2d at 1403-04, 1408, 1418-19. In *Akin*, 156 F.3d at 1036, the Tenth Circuit found that a defendant was not barred from removal simply by filing a motion for summary judgment in the state court because the defendant's actions in state court were taken "before it was unequivocally apparent that the case was removable." The Tenth Circuit explained that no waiver could be found "in the absence of adequate notice of the right to remove." *Id.*

Indeed, even in the context of contractual waivers of removal rights, where some courts of appeals do not require waivers to meet the rigorous "clear and unequivocal" standard, a number of courts of appeals have found mere silence as to a defendant's specific intentions on removal to be insufficient to constitute

a waiver. See, *e.g.*, *Regis*, 894 F.2d at 195-96 (no waiver of removal rights where forum selection clause only addressed "which country would be the forum for litigation" and "nothing in the language ultimately chosen ... suggests any intent on the part of anyone to waive the right of removal from state to federal court"); *Weltman* v. *Silna*, 879 F.2d 425, 427 (8th Cir. 1989) (no waiver of removal rights where party contractually consented to subject matter jurisdiction and venue in state court, but the contractual provision "did not address removal").

The Third Circuit's decision also is at odds with the outcomes of decisions of district courts in other circuits. For example, in one case, the defendant learned during *closing arguments* that the case had become removable, and the district court found no waiver despite the fact that the defendant did not state its intention to file for removal *until the following day* (at 2:00 p.m.), after jury deliberations had begun but before the jury had reached a verdict. See *Heniford* v. *Am. Motors Sales Corp.*, 471 F. Supp. 328, 335 (D.S.C. 1979). Similarly, in *Johnson* v. *Celotex Corp.*, 701 F. Supp. 553, 556 (D. Md. 1988), the district court found no waiver when, after weeks of trial, the case became removable and the defendant did not notify the court of its intention to remove *until the following day*. The court held that the "facts here indicate that defendant Celotex acted promptly and in full compliance with [§] 1446(b) when it indicated in state court that it intended to exercise its right of removal." *Id.* See also *Barabin* v. *Albany Int'l Corp.*, 2007 WL 4376181, at *1-2 (W.D. Wash. Dec. 12, 2007) (no waiver where defendant did not file a notice of removal for 12 days after case became removable, during which time defendant filed various motions, including their trial briefs).

In sum, it is plain that if Maremont's removal petition had been filed in a trial court in most, if not all, other circuits, its statutory right to removal would not have been forfeited by its mere participation in the jury selection. This is precisely the kind of decision by geography that this Court grants certiorari to prevent. The removal statutes deserve uniform interpretation and application; only this Court can ensure that they are applied consistently.

This case is an appropriate vehicle for resolving this circuit conflict because the facts governing the waiver issue are straightforward and undisputed. By granting this petition, this Court would provide meaningful guidance concerning when the right to remove is waived by litigation conduct.[5]

II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL.

The "clear and unequivocal" standard for waiver applied by other courts of appeals is the only standard that is faithful to the statute. As those courts have recognized, when properly invoked, a defendant's right to removal is "absolute." *Regis*, 894 F.2d at 195. In diversity cases, the "absolute" nature

---

[5] The fact that the Third Circuit's decision is unpublished does not render this case an inappropriate vehicle for certiorari. This Court routinely grants certiorari with respect to unpublished decisions, particularly when those decisions squarely implicate circuit conflicts. *See, e.g., Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 430-31 (2001) (unpublished Ninth Circuit decision implicating circuit conflict); *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (unpublished Fourth Circuit decision implicating circuit conflict).

of the right is consistent with the important purposes that it serves: it gives defendants a "right to a federal forum," and the "motivating concern" is to "protect litigants against local prejudice, influence, and discrimination." *Rothner*, 879 F.2d at 1407. See *Guar. Trust Co.* v. *York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); see also *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6 (1995) ("the presupposition for diversity jurisdiction" is "a concern with local bias").

A federal right of this importance cannot be waived through inadvertence or a few hours' silence by counsel. A defendant must clearly and unequivocally, through affirmative actions or statements, assert its intention to remain in state court and forego the federal forum. As the Sixth Circuit has noted, "[t]he right of removal is statutory and, generally, it is the waiver of a statutory right that must be set forth, not the intent to rely on the statute." *Regis*, 894 F.2d at 195.

Indeed, the Third Circuit's harsh waiver standard is inconsistent with the specific provisions of the removal statute. Congress was well aware that cases could suddenly become removable in the middle of a proceeding due to "a change of parties as an action progresses toward trial in state court." H.R. Rep. No. 100-889, at 72 (1988). Congress dealt with this frequent occurrence through two specific provisions. First, to address changed circumstances generally, Congress provided that a defendant has *30 days* to file a notice of removal after receipt of a "copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one

which is or *has become* removable." 28 U.S.C. § 1446(b) (emphasis added). Second, for diversity cases specifically, Congress amended this subsection in 1988 to prohibit a defendant from removing diversity cases "more than 1 year after commencement of the action." *Id.*

Maremont fully complied with both of these statutory provisions – it filed its notice of removal the same day it learned the case had become removable (with 29 days and 18 hours to spare), and it filed within one year of the original commencement of the action. Under the Third Circuit's waiver standard, however, Maremont lost its "absolute" removal rights notwithstanding the fact that it immediately and hurriedly prepared the necessary removal papers over the course of a few hours. This result simply cannot be reconciled with Congress's more generous allotments of 30 days and one year. Moreover, given Congress's decision to address the issue of diversity jurisdiction arising after substantial proceedings have occurred in state court through a bright-line, one-year cutoff rule, a draconian waiver standard for cases that are within the one-year period – as the Third Circuit adopted here – is fundamentally misplaced.[6]

Thus, Maremont's actions here cannot be deemed a waiver of its right to removal under a reasonable interpretation of the statute. As other federal courts have correctly held, a defendant cannot be faulted

---

[6] Indeed, some courts and authorities have questioned whether the judge-made rule that a defendant can waive its right to removal in litigation even survived Congress's 1948 enactment of a specific time period for filing a notice of removal when a case becomes removable in mid-course. *See, e.g., Rothner*, 879 F.2d at 1415 (quoting 1A *Moore's Federal Practice* ¶ 0.157[9], at 151 (2d ed. 1987)).

merely for participating briefly and defensively in the state court proceeding while it explores the possibility of removal. See *Grubb*, 935 F.2d at 58-59; *Rothner*, 879 F.2d at 1403-04, 1408, 1418-19; *Heniford*, 471 F. Supp. at 335; *Johnson*, 701 F. Supp. at 556. To be sure, as this Court noted in 1893 (long before § 1446's 30-day rule), "the spirit of the removal acts ... do[es] not contemplate that a [plaintiff] may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court." *Rosenthal* v. *Coates*, 148 U.S. 142, 147 (1893). But as the other federal courts have recognized, the sort of brief participation in state proceedings that took place here does not present such concerns. Jury selection was far from over when Maremont removed, and all of Maremont's actions here leave no doubt that its intention at all times was to remove the case as expeditiously as possible.

Moreover, a waiver standard that required a party to give the plaintiff and the court instantaneous advance notice that it intended to pursue removal would not further any valid purpose under the removal statute. In fact, it would undermine the important interests protected by removal because it would require all defendants to broadcast their litigation strategies to their opponents in order to retain their federal rights. The *Tedford* case illustrates the pitfalls of this approach. The defendant in *Tedford* gave advance notice of its intention to remove as a "professional courtesy," and the plaintiff responded by "quickly act[ing] to thwart" removal by adding a new non-diverse (and ultimately dismissed) defendant. *Tedford*, 327 F.3d at 428.

Even if Maremont sought to gain a strategic advantage by removing the case to federal court, such a tactic is not a ground for finding waiver. As the

Seventh Circuit has held, a "defendant's motive for removing is not a proper consideration for remand," because "*[e]very* defendant who removes considers the prospect of a favorable result in the federal forum." *Rothner*, 879 F.2d at 1408 (emphasis added). Indeed, the whole purpose of removal in diversity cases is now, as it has been for more than 200 years, to avoid the risk of an unfavorable forum in a state court and that risk obviously increases dramatically when the last defendant with any links to the state has been released from the litigation.

Finally, the flawed nature of the Third Circuit's waiver standard is further demonstrated by the fact that it bears no resemblance to the standard used to determine waiver of the right to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* Federal courts repeatedly have held that the right to arbitrate cannot be waived merely by a failure to assert the right at the earliest possible moment. *E.g., Nicholas* v. *KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009) ("waiver of arbitration is a disfavored finding"); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir. 2007) ("waiver 'is not be to lightly inferred'"). Thus, "[a] presumption against waiver exists such that the party asserting waiver 'bears a heavy burden of proof in its quest to show' waiver." *Petroleum Pipe Ams. Corp.* v. *Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009). Delay in asserting the right to arbitrate, and participation in litigation, will not by themselves constitute waiver, absent a showing that the other party was prejudiced. *Forrester* v. *Penn Lyon Homes, Inc.*, 553 F.3d. 340, 343 (4th Cir. 2009); *Ehleiter*, 482 F.3d at 223; *Mercury Constr. Corp.* v. *Moses H. Cone Mem'l Hosp. (In re Mercury Constr.*

Corp.), 656 F.2d 933, 939 (4th Cir. 1981) (en banc), *aff'd on other grounds*, 460 U.S. 1, 24-25 (1983).[7]

Given the robust showing that must be made in order to demonstrate that a party has waived its right to arbitration, even where the party did not immediately assert the right, the Third Circuit's holding that the right to removal – which if anything is even more important to most litigants – can be waived through prompt and diligent efforts to *pursue* that right is completely misguided. It is a trap for the unwary and vindicates no purpose of the removal statute. For all of these reasons, the Third Circuit's holding warrants this Court's review.

III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' waiver ruling, and the circuit conflict that it implicates, also presents a recurring and "important question" of federal law that warrants this Court's attention. See Sup. Ct. R. 10(c).

As a general matter, this Court historically has taken a particular interest in ensuring that the standards for removal to federal courts are applied evenly across the country. This Court has granted certiorari in a number of cases to resolve conflicts about the legal standards governing removal; indeed, this Court granted certiorari in such a case just last month. See, *e.g.*, *Health Care Serv. Corp.* v. *Pollitt*,

---

[7] *See also, e.g.*, *Rush* v. *Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985) ("defendants' delay in seeking arbitration during approximately eight months of pretrial proceedings is insufficient by itself to constitute a waiver of the right to arbitrate, for in addition, prejudice to [the plaintiff] must be demonstrated").

78 U.S.L.W. 3050 (U.S. Oct. 13, 2009) (No. 09-38) (order granting certiorari); *Carlsbad Tech. Inc.*, 129 S. Ct. 1862; *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Murphy Bros.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999); *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 392 (1998); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 709-11 (1996); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 126 (1995). See also *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188 (1936) ("there should be a consistent practice in dealing with jurisdictional questions").

In addition, the specific removal issue presented here – whether the right to remove is waived by a defendant's litigation conduct in response to changed circumstances that have rendered a case removable for the first time – is one that frequently arises in diversity cases and that has considerable consequences for defendants' right to litigate such cases in federal court. As noted, the recurring nature of this issue was recognized by Congress when it amended the removal statute in 1988 to establish a one-year time limit on the removal of diversity cases. Congress recognized that many cases filed in state court are not removable when initially filed, but then become removable at a later stage of the proceedings due to "a change of parties as an action progresses toward trial in state court." H.R. Rep. No. 100-889, at 72. Indeed, Congress recognized the frequent occurrence of precisely the circumstance that arose in this case:

> The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction.... Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining

defendants to remove.

Id.

The recurring nature of this scenario is further increased by the widespread practice by plaintiffs of fraudulently joining in-state defendants to defeat diversity jurisdiction (although there is no indication that any such conduct occurred in this case). See, *e.g.*, E. Farish Percy, *Making A Federal Case Of It: Removing Civil Cases To Federal Court Based On Fraudulent Joinder*, 91 Iowa L. Rev. 189, 191-92 (Oct. 2005) (noting that "plaintiffs have long attempted to defeat removal to federal court by joining claims against in-state defendants" and that "[r]ecently, fraudulent joinder litigation has increased dramatically"). Although claims of fraudulent joinder are "escalating throughout the country" in many areas of litigation, the practice is particularly notorious in complex tort litigation, including products liability litigation. See *id.* at 192 (charges of fraudulent joinder are "fast becoming a prominent and time-consuming aspect of complex tort litigation"). In cases that are in state court as a result of fraudulent joinder, defendants can at any time learn facts that permit the inappropriate joinder to be eliminated.

Given this context where defendants in state court commonly learn that cases are potentially removable for the first time during pre-trial or trial proceedings as a result of new developments or new information, it is critically important that defendants' statutory and absolute right to remove cases to federal court be protected. Under the Third Circuit's waiver ruling, however, defendants can forfeit this right if they merely take the time to investigate and verify the removability of the case – as they are required to do

under Fed. R. Civ. P. 11[8] – and in no way manifest a knowing and voluntary relinquishment of their right to a federal forum. While this loss of removal rights through inadvertence is unacceptable in any context, it is utterly offensive in circumstances where the plaintiff deliberately avoided the federal forum through fraudulent joinder and the defendant merely sought to eliminate the fraud. If left standing, however, the inevitable result of the Third Circuit's decision will be further inadvertent losses of removal rights – a result that can only encourage fraudulent joinder. Accordingly, the Third Circuit's waiver ruling poses a recurring question of fundamental importance that warrants this Court's review.

---

[8] *See* 28 U.S.C. § 1446(a) (a notice of removal must be signed pursuant to Rule 11).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. CANONI
KASOWITZ, BENSON,
TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
JAMES P. YOUNG
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 6, 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2573
(D.N.J. No. 2-09-cv-02501)

FLORENCE DIANE ST. JOHN, *et al.*,
Appellee,

v.

AFFINIA GROUP, INCORPORATED, *et al.*,
MAREMONT CORPORATION,
Appellant.

ORDER

The foregoing Motion by Appellee Florence Diane St. John to Remand Case to the Superior Court of the State of New Jersey, or in the alternative, to Dismiss Case for Lack of Jurisdiction is hereby GRANTED to the extent that, for essentially the reasons provided by the District Court, this matter is REMANDED to the Superior Court of New Jersey, Middlesex County, for further proceedings. The Motion by Appellant for Enlargement of the Record on Appeal with the Transcript of the Proceedings from the New Jersey Superior Court, Middlesex County, before Hon. Ann G. McCormick on *05/26/09* is denied as moot.

By the Court,

/s/ Kent A. Jordan
Circuit Judge

Dated: 3 September 2009

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 09-2501 (WJM)

FLORENCE DIANE ST. JOHN, INDIVIDUALLY AND AS ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF HAROLD ST. JOHN
Appellee,

v.

AFFINIA GROUP, INC., *et al.*
Appellant.

June 8, 2009, Decided
June 8, 2009, Filed

JUDGES: William J. Martini, *Senior United States District Judge.*

OPINION BY: William J. Martini

OPINION

LETTER OPINION

This matter comes before the Court on Defendant Maremont's motion to stay the May 29, 2009 order of this Court remanding the above-captioned action to state court, pending appeal to the Third Circuit. Oral arguments were held telephonically on June 1, 2009. For the reasons stated below, Defendant's motion is GRANTED.

BACKGROUND

This personal injury and wrongful death action was originally filed by Plaintiff Florence Diane St. John ("St. John") in the Superior Court of New Jersey, Middlesex County, on June 19, 2008 (Pl.'s Order to Show Cause P A). The complaint was amended several times to add additional defendants and reflect the death of Plaintiff Harold St. John ("Decedent") (Pl.'s Order to Show Cause P B). Trial was scheduled to commence in the Superior Court on May 26, 2009. At approximately 9 a.m. that morning, immediately prior to the start of jury selection, Plaintiff notified the court and the parties that it had reached a settlement with one of the defendants, Honeywell International ("Honeywell") and that Honeywell would therefore no longer be a party to the action. Honeywell was the last remaining defendant in the case with a principal place of business or domicile in the state of New Jersey (Pl.'s Order to Show Cause PP D-F).

Shortly thereafter, jury selection began (Pl's Order to Show Cause P G). Throughout the morning and early afternoon of May 26, both Plaintiff and Defendants actively participated in the selection process. Defendants exercised multiple peremptory and for-cause challenges to potential jurors. At the same time and without giving any indication to the state court that it was considering removal to federal court, Defendant Maremont ("Maremont") conferred with the other parties to determine the existence of diversity jurisdiction pursuant to Honeywell's dismissal and drafted removal papers (Pl's. Order to Show Cause P I). Then, at 2:54 p.m., Maremont electronically filed its notice of removal with the United States District Court for the District of New Jersey and at 2:59 p.m., filed a copy of the notice with the state court clerk's office.

Shortly thereafter, Maremont provided copies to the state court judge and Plaintiff, alerting them to the removal (Dfdt's Motion to Stay 3). The notice was signed by all Defendants. After learning of the filing, the state court judge temporarily halted jury selection.

On May 27, 2009, Plaintiff filed an order in federal court to show cause why the matter should not be remanded to New Jersey state court. This Court considered the papers submitted by Plaintiff and heard oral arguments from all parties. The Court concluded that the case should be remanded and issued an order to that effect. Based upon the remand, the state court ordered jury selection and trial to resume on June 2, 2009.

On May 29, 2009, Maremont filed a motion to stay the remand order, pending appeal to the Third Circuit. Maremont simultaneously filed a notice of appeal and an application to the Third Circuit Court of Appeals. Presently at issue before this Court is: (1) whether Defendants have the right to appeal the remand order; and (2) whether a stay of the remand order is waranted.

ANALYSIS

Defendant Maremont brings this motion to stay pending appeal pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8. As explained below, the Court finds that Defendants have the right to appeal and that a stay of the remand order pending appeal is warranted.

I. Defendants Can Appeal the May 28, 2009 Remand Order

28 U.S.C. § 1447(d) provides in pertinent part that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." On its face, the statutory language ap-

pears to bar appellate review of virtually all remand orders. However, the Supreme Court has consistently held that § 1447(d) must be read in conjunction with §1447(c) such that the statute only bars review of remand orders based upon the grounds for remand specified in § 1447(c), namely a lack of jurisdiction in the federal court. *Carlsbad Tech. Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1865-1866, 173 L. Ed. 2d 843 (2009); *Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 345-346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976). § 1447 does not preclude review of an order that was based upon a court's discretionary decision to remand a case. *See Carlsbad*, 129 S.Ct. at 1867 (a court's decision to remand a case rather than exercise supplemental jurisdiction over state law claims once the only federal claim dismissed was reviewable because removal was proper initially and the remand was discretionary).

In the present case, at the time Maremont and the other Defendants removed the case to federal court, removal was jurisdictionally proper. Diversity of citizenship existed and the amount in controversy satisfied the $ 75,000 threshold. The case was not remanded for lack of jurisdiction. Rather, the case was remanded because Defendants proceeded with trial in state court while simultaneously preparing to remove the case to federal court. Whether or not it was their intention, this conduct enabled Defendants to assess the state court jury pool and then decide whether to remove. This Court concluded that this behavior constituted a waiver of Defendants' right to remove, such that the case had to be remanded.

Because removal was initially proper, the case could have remained in federal court had Plaintiff not raised the issued of waiver. Thus, this Court's decision to remand the case to state court on the grounds

of waiver was an exercise of discretion. As such, the remand order does not fall under § 1447's purview and can be appealed.

II. A Stay of the Order is Warranted Pending Appeal

When evaluating a motion for stay pending appeal, the Court must examine the following factors: (1) whether the moving party has demonstrated a likelihood of success on the merits; (2) whether the moving party will be irreparably harmed should the motion be denied; (3) whether the issuance of a stay will cause substantial harm to the other parties in the action; and (4) where the public interest lies. *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). The factors need not be rigidly applied or weighed equally and no single factor is determinative of the result. *See Hilton v. Braunskill*, 481 U.S. 770, 777, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

In the present case, both consideration of the public interest and of harm to the other parties if the stay is granted weigh slightly in favor of the moving party. As Maremont points out in its papers, granting the stay may conserve judicial resources and the only harm to Plaintiff will be a short although not inconsequential delay.

More significant here is the consideration of the likelihood of success on the merits. As discussed above, this Court already concluded that by continuing with jury selection in state court while simultaneously preparing the case for removal to federal court, Defendants waived their right to remove. *See JP Morgan Chase Bank v. Smith*, 2008 U.S. Dist. LEXIS 59032, 2008 WL 2943369 (D.N.J.) (finding that participation in state court proceedings can constitute waiver of a

litigant's right to remove the case to federal court); *see also* Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 3721 (3d ed. 2008) (stating that "a state court defendant may lose or waive the right to remove the case to a federal court by taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court").

It was incumbent upon Defendants to notify the state court and ask for a brief adjournment as soon as they began contemplating removal. Even if their request had been denied, merely asking would have preserved the right.[1] But Defendants did not ask. As Maremont admits in its own papers, it first realized upon Honeywell's dismissal that the case had possibly become removable. Yet Maremont did not tell the state court of its plans until six hours later, after it filed for removal. During those six intervening hours, Defendants simultaneous prepared their removal documents and continued with jury selection. This course of action enabled Defendants to evaluate the potential jury pool and then decide whether or not to remove. Even if this was not Defendants' intention, permitting this conduct would pave the way for future parties to jury shop. *See Estate of Krasnow v. Texaco, Inc.*, 773 F.Supp. 806 (1991), *as qtd. in JP Morgan Chase Bank v. Smith* 2008 U.S. Dist. LEXIS 59032, 2008 WL 2943369 ("[A] defendant must not be allowed to

---

[1] Indeed, given that the state court judge temporarily adjourned the case that afternoon, as soon as she learned of the removal, it is reasonable to infer that she would have granted an adjournment that morning, had Defendants informed her that they were exploring the possibility of removal and needed a short amount of time to consider their options.

test the waters in state court and, finding the temperature not to its liking, beat a swift retreat to federal court. Such behavior falls within the very definition of forum-shopping and is antithetical to federal-state court comity"). Defendants' behavior must be found to constitute a waiver and therefore the likelihood that they will succeed upon the merits of their appeal is slim. This factor on its own does not weigh in favor of granting the stay, but significantly, it cannot be examined in isolation.

The most important factor in this examination is the risk of substantial harm to Defendants should the stay be denied. Absent the stay, the state court proceedings would resume. The trial would re-commence and continue to verdict. Should the Third Circuit find in favor of Defendants at a later date, there would be scant relief available to them at that time. Thus, however small the likelihood that Defendants will succeed upon the merits, the magnitude of harm that would result would be so great that this Court finds in favor of granting Defendants' motion to stay.

CONCLUSION

For the reasons stated above, Defendants' motion for stay pending appeal is GRANTED. An appropriate Order was executed on June 1, 2009.

/s/ William J. Martini
William J. Martini U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Filed 05/29/2009]

Docket No.: 09-cv-2501

FLORENCE DIANE ST. JOHN,
Individually and as Representative of the
Estate of Harold St. John,
Plaintiff,

vs.

CARLISLE, INC., *et al.*
Defendants.

Hon. William J. Martini, U.S.D.J.

CIVIL ACTION

ORDER

This matter having been opened to the Court on an emergent application on behalf of Plaintiffs by Szaferman, Lakind, Blumstein & Blader, P.C. and Levy Phillips & Konigsberg (Moshe Maimon, Esq. appearing), on notice to counsel for Defendants; and the Court having considered the papers submitted in support of the Order to Show Cause, as well as the arguments of counsel; and for good cause having been shown;

IT IS on this 27th day of May, 2009,

ORDERED that Plaintiffs' Complaint be and is hereby remanded to the Superior Court of New Jersey, Middlesex County; and it is further

ORDERED that a copy of this Order be served on all counsel of record within seven days.

/s/ Hon. William J. Martini
Hon. William J. Martini, U.S.D.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2573
(D.N.J. No. 2-09-cv-02501)

FLORENCE DIANE ST. JOHN, *et al.*

v.

AFFINIA GROUP, INCORPORATED, *et al.*
MAREMONT CORPORATION,
Appellant.

SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, *Chief Judge*, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and JORDAN, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:
/s/ Kent A. Jordan
Circuit Judge

Dated: 8 October 2009

Supreme Court, U.S.
FILED
DEC 10 2009
OFFICE OF THE CLERK

No. 09-568

IN THE
Supreme Court of the United States

MAREMONT CORPORATION,
Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of Harold St. John,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

MOSHE MAIMON
LEVY PHILLIPS & KONIGSBERG, L.L.P.
101 GROVERS MILL RD.
SUITE 200
LAWRENCEVILLE, NJ 08648
(609) 275-0400

ARNOLD C. LAKIND
Counsel of Record
MARK A. FISHER
SZAFERMAN, LAKIND, BLUMSTEIN & BLADER, P.C.
101 GROVERS MILL RD.
SUITE 200
LAWRENCEVILLE, NJ 08648
(609) 275-0400

Counsel for Respondent Florence Diane St. John

QUESTION PRESENTED

Below, the Third Circuit Court of Appeals granted a motion to remand based upon a procedural defect in Petitioner's Notice of Removal. Should this Court order review on a writ of certiorari to address the fact-specific waiver question posed by Petitioner, which was never ruled upon by the Court of Appeals?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. MAREMONT'S QUESTION PRESENTED WAS NOT PRESENTED TO OR RULED UPON BY THE THIRD CIRCUIT 6

II. THE COURT LACKS JURISDICTION TO REVIEW A REMAND BASED UPON A PROCEDURAL DEFECT IN THE NOTICE OF REMOVAL 7

III. EVEN AS FRAMED BY MAREMONT, THE QUESTION PRESENTED DOES NOT WARRANT REVIEW 8

IV. MAREMONT WAIVED ITS RIGHT TO REMOVE BY PARTICIPATING IN JURY SELECTION WHILE REMAINING SILENT ABOUT ITS PLAN TO REMOVE 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Andalysia Enters., Inc. v. Evanston Ins. Co.,
487 F. Supp. 2d 1290 (M.D. Ala. 2007) 3

Akin v. Ashland Chemical Co.,
156 F.3d 1030 (10th Cir. 1998) 20

Carlsbad Tech. Inc. v. HIF Bio, Inc.,
__ U.S. __, 129 S. Ct. 1862 (2009) 6, 13

Chicago Title & Trust Co. v. Whitney Stores, Inc.,
583 F. Supp. 575 (N.D. Ill. 1984) 18

Com. of Pa. v. Newcomer,
618 F.2d 246 (3d Cir. 1980) 17

Durand v. The Hartford *Life and Acc. Ins. Co.*,
2007 WL 1395336 (D. Colo. 2007) 3

Employer Shopmens Local 516 Pension Trust v. Travelers Cas. And Sur. Co. Of America,
2005 WL 1653629 (D. Or. July 6, 2005) 3

Foster v. Chesapeake Insurance Co.,
933 F.2d 1207 (3d Cir. 1991) 9

TABLE OF AUTHORITIES - continued

Grubb v. Donegal Mutual Insurance Co.,
935 F.2d 57 (4th Cir. 1991) 18

JP Morgan Chase Bank, N.A. v. Smith,
2008 WL 2943369 (D. N. J.) 11

Kinateder v. Am. Family Mut. Ins. Co. of Wis.,
2009 WL 539668 (D. Colo. Mar. 4, 2009) 3

Kircher v. Putnam Funds Trust,
547 U.S. 633 (2006) 6

Kisor v. Collins,
338 F. Supp. 2d 1279 (N.D.Ala. 2004) 3

Estate of Krasnow v. Texaco, Inc.,
773 F. Supp. 806 (E.D. Va. 1991) 11

Lewis v. Rego Comp.,
757 F.2d 66 (3rd Cir. 1985) 13

Lupo v. Human Affairs Intern, Inc.,
28 F.3d 269 (2d. Cir. 1994) 14

Macri v. M & M Contractors, Inc.,
897 F. Supp. 381 (N.D. Ind.1995) 3

Mancari v. AC & S,
683 F. Supp. 91 (D. Del. 1988) 18

TABLE OF AUTHORITIES - continued

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178 (1936) 13

Murphy Brothers v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) 13

Powertex Corp. v. Reliant Energy Services, Inc.,
551 U.S. 224 (2007) 8, 13

Pritchett v. Office Depot, Inc.,
420 F.3d 1090 (10th Cir.2005) 14

Quackenbush v. Allstate Insurance Co.,
517 U.S. 706 (1996) 13

Regis Associates v. Rank Hotels (Mgmt) Ltd.,
894 F.2d 193 (6th Cir. 1990) 14

Rosenthal v. Coates,
148 U.S. 142 (1893) 17, 21

Rothner v. City of Chicago,
879 F.2d 1402 (7th Cir. 1989) 19

Schmitt v. Insurance Co. of N. Am.,
845 F.2d 1546 (9th Cir. 1988) 6

Snapper, Inc. v. Redan,
171 F.3d 1249 (11th Cir. 1999) 10

TABLE OF AUTHORITIES - continued

Suter v. Munich Reinsurance Co.,
223 F.3d 150 (3d Cir. 2000) 9

Tedford v. Warner-Lambert Co.,
327 F.3d 423 (5th Cir. 2003) 12, 15

Things Remembered, Inc. v. Petrarca,
516 U.S. 124 (1995) 13

Waldron v. Skelly Oil Co.,
101 F. Supp. 425 (E.D. Mo.1951) 18

Waller v. American Telegraph and Tel,
684 F. Supp. 475 (S.D. Tex. 1988) 18

Wis. Department of Corr. v. Schacht,
524 U.S. 381 (1998) 13

STATUTES

28 U.S.C. § 1441 ..... 2, 12

28 U.S.C. § 1446 ..... 1, 3

28 U.S.C. § 1447 ..... 4, 6, 7, 8

RULE

Sup. Ct. R. 10 12

TABLE OF AUTHORITIES - continued

LEGISLATIVE MATERIALS

Pub. L. No. 100-702 3

OTHER AUTHORITIES

1A Moore's Federal Practice ¶ 0.157[9] 18

Wright and Miller, Federal Practice and Procedure § 3721 (3d ed.2008) 11

INTRODUCTION

Maremont Corporation's (Maremont or Petitioner) petition is premised on a misapprehension of the Third Circuit Court of Appeals' ruling. That court granted Respondent Florence St. John's motion for a remand based upon a procedural defect in Maremont's Notice of Removal. The Notice was defective because Maremont failed to attach summonses and orders as required by 28 U.S.C. §1446(a). In opposing the motion, Maremont did not dispute the procedural defect in its removal, nor did it seek to cure the deficiencies. Rather, it argued that remand was not mandatory and that the court had the discretion to permit a cure. In a one-sentence decision, the court granted the motion before it and remanded the case. Thus, the court never ruled upon the issue presented in Maremont's petition.

Moreover, even as set forth in the petition, Maremont's question does not warrant review because there is no conflict among the circuit courts, and because there is no issue of federal importance to resolve.

The petition should be denied.

STATEMENT OF THE CASE

This mesothelioma death case came on for trial in the Superior Court of New Jersey, Middlesex County vicinage, on May 26, 2009. Shortly before the trial began, counsel to Plaintiff reported to Defendants that Mrs. St. John had settled her claims with Honeywell

Corp., which was the only remaining non-diverse defendant. As a result, the matter became removable under 28 U.S.C. § 1441.

Rather than inform the trial court of their intention to remove, or seek leave to stay the trial, Defendants remained silent, and jury selection began. Defendants introduced themselves to the jury; they identified potential witnesses for the jury; and they participated in jury selection. In particular, Maremont exercised two of its allotted three peremptory challenges and dismissed other jurors for cause. The other Defendants also participated in jury selection and, collectively, they discharged nearly one dozen potential jurors. Plaintiff, in contrast, retained the overwhelming majority of her challenges.

Apparently dissatisfied with the emerging jury panel and the depleted supply of peremptory challenges, Maremont elected to remove this matter to the United States District Court for the District of New Jersey. At around 3:00 P.M. that afternoon, Maremont, joined by all other Defendants, filed a Notice of Removal with the district court.

After the Notice was filed, Mrs. St. John filed an Order to Show Cause seeking a remand to the state court on grounds of waiver. Following argument, the district court made a fact-specific decision, concluding that Maremont's participation in jury selection resulted in a waiver of its right to remove.

Maremont appealed to the Third Circuit Court of

Appeals and filed a motion to stay the remand in the District Court. The District Court granted the motion to stay, while reiterating the correctness of its decision to remand.

After the thirty-day statutory removal period expired, Mrs. St. John filed, in the Court of Appeals, a motion to remand on the ground that the Notice of Removal did not include the summonses and orders entered below, as required by 28 U.S.C. 1446(a). Mrs. St. John argued that remand was now required because the defect in the Notice could no longer be cured.[1] In

---

[1] Following Congress' adoption of the "1988 Judicial Improvements Access to Justice Act," Pub. L. No. 100-702, courts have held that a procedurally defective Notice of Removal may not be cured after the expiration of the thirty-day removal period if a plaintiff has filed a timely motion to remand. *See, e.g., Andalysia Enters., Inc. v. Evanston Ins. Co.*, 487 F. Supp. 2d 1290 (M.D. Ala. 2007) (requirement in 28 U.S.C.A. § 1446(a) that removing party "shall file . . . process" is mandatory and incurable after 30 days); *Kisor v. Collins*, 338 F. Supp. 2d 1279, 1281 (N.D.Ala. 2004)("This court, sitting as a court of limited jurisdiction, cannot ignore a manifest procedural defect that a plaintiff has expressly complained about just because the defect was inadvertent or because the removing defendant tenders a belated correction."); *Macri v. M & M Contractors, Inc.*, 897 F. Supp. 381 (N.D. Ind.1995) (case remanded when defects of an unsigned removal petition, lack of prompt written notice to plaintiff, and failure to promptly file a copy of the notice with the state court were not cured within 30-day removal period); *Kinateder v. Am. Family Mut. Ins. Co. of Wis.*, 2009 WL 539668 (D. Colo. Mar. 4, 2009) (remand based on failure to file a state-court order); *Durand v. The Hartford Life and Acc. Ins. Co.*, 2007 WL 1395336 (D. Colo. 2007) (case remanded where defendant fails to include summons with Notice of Removal); *Employer Shopmens Local 516 Pension Trust v. Travelers Cas. And Sur. Co. Of*

the alternative, she argued that appellate jurisdiction was lacking because the district court's remand order was not appealable under 28 U.S.C. § 1447.

In response, Maremont maintained that, unlike the mandatory nature of remand if a defect in removal is jurisdictional, a remand based on a procedural defect is left to the court's discretion. In reply, Mrs. St. John pointed out that, even if the court had the authority to excuse the deficiency, Maremont had failed to offer any reason for it to do so. Moreover, she continued, because Maremont had participated in state-court jury selection without informing the court or counsel of its decision to remove, there was no warrant to exercise discretion for Maremont's benefit.

In a single sentence, the Third Circuit Court of Appeals granted the motion to remand:

> *The foregoing* Motion by Appellee Florence Diane St. John to Remand Case to the Superior Court of the State of New Jersey, or in the alternative, to Dismiss Case for Lack of Jurisdiction is hereby GRANTED to the extent that, for essentially the reasons provided by the District Court, this matter is REMANDED to the Superior Court of New Jersey, Middlesex County, for further proceedings.

America, 2005 WL 1653629 at 4 (D. Or. July 6, 2005). Maremont's petition does not challenge this case law.

Pet. App. 1a.

Thus, the Third Circuit granted the motion to remand due to Maremont's defective Notice of Removal. Contrary to Maremont's assertion in the Petition, the court did not "affirm" the District Court's holding that Maremont waived its right to remove; the propriety of that holding had not yet been briefed by the parties or presented to the appellate court.

REASONS FOR DENYING THE WRIT

I. MAREMONT'S QUESTION PRESENTED WAS NOT PRESENTED TO OR RULED UPON BY THE THIRD CIRCUIT.

Mrs. St. John made two arguments in the Court of Appeals. The primary relief sought in the motion on which the court ruled was a remand to state court based upon an incurable procedural defect in Maremont's Notice of Removal. In the alternative, she sought dismissal of Maremont's appeal on the ground that appellate jurisdiction was lacking because the District Court's waiver-based remand decision was not appealable under 28 U.S.C. § 1447.[2] The Third Circuit Court of Appeals ruled on the first argument and ordered the case remanded.[3]

---

[2] Specifically, Mrs. St. John maintained that, because the district court held that Maremont had waived its right to remove, Maremont's removal was defective for a reason "other than lack of subject matter jurisdiction" under the purview of 28 U.S.C. § 1447(c) and, therefore, was not reviewable under 28 U.S.C. § 1447(d). *See, e.g., Carlsbad Tech. Inc. v. HIF Bio, Inc.*, __ U.S. __, 129 S. Ct. 1862 (2009); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006)("[W]e have relentlessly repeated that any remand order issued on the grounds specified in § 1447(c) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court.")(internal brackets and quotations omitted); *See also Schmitt v. Ins. Co. of N. Am.*, 845 F. 2d 1546 (9th Cir. 1988) (finding a remand based on waiver within 28 U.S.C. § 1447(c)).

[3] The court did not, as the Petitioner suggests, "reject" the Plaintiff's alternative argument to dismiss the appeal (*see* Pet.

Again, the only basis for the motion to remand was the procedural defect in the Notice of Removal. By referring to "the reasons provided by the District Court," the order appeared to agree with Maremont that it had discretion to allow Maremont to cure the defect. But the court declined to exercise that discretion and remanded on the basis of the procedural defect, in light of the reasons stated by the District Court.

The Third Circuit did not decide the waiver issue set forth in Maremont's Question Presented. The issue was not even briefed on the motion. Because Maremont seeks review of a remand order based upon an issue that was not presented to the appellate court, the petition should be denied.

II. THE COURT LACKS JURISDICTION TO REVIEW A REMAND BASED UPON A PROCEDURAL DEFECT IN THE NOTICE OF REMOVAL

With few exceptions, an order remanding a case to the state court from which it was removed is not reviewable on appeal. 28 U.S.C. § 1447(d).[4] And as this

---

6 at n.2); it simply did not reach it, as even a cursory review of the very brief order makes plain. *See* Pet. App. 1a.

[4] Section 1447(d) states, in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal

Court has stated, section 1447(d) "preclude[s] review" of remands "for defects in removal procedure." *Powertex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 229 (2007).

Because the Third Circuit granted Respondent's motion to remand for "defects in removal procedure," this Court lacks jurisdiction to review the order below, and, for this additional reason, the Petition should be denied.

III. EVEN AS FRAMED BY MAREMONT, THE QUESTION PRESENTED DOES NOT WARRANT REVIEW

With regard to the waiver issue itself, and contrary to Petitioner's assertion, the circuit courts have not adopted differing standards to evaluate when a waiver has occurred. Rather, the relevant distinction is between those cases that address the consequences of a waiver claimed to have occurred prior to trial, and those that address the consequences of a waiver claimed to have occurred during trial. Courts are uniform in their treatment: They are less willing to find that a waiver has occurred before a trial commences than thereafter.

Moreover, even if --as Maremont claims—the Third Circuit had adopted the District Court's ruling, that ruling was based on the appropriate legal standard. The District Court found a clear and

---

or otherwise."

unequivocal waiver, and remanded on that basis. Maremont's disagreement with the District Court's application of the facts to the agreed-upon standard does not merit review. In addition, given the unusual facts of this case, the District Court's decision will have no widespread implications.

A. The Court of Appeals' Order Does Not Create a Conflict Among The Circuits.

Maremont claims that the Third Circuit's order conflicts with decisions of other courts of appeals on the issue whether a defendant must manifest a "clear and unequivocal" intent to waive its right to remove before this right is lost. In fact, like other circuits, the Third Circuit follows the "clear and unequivocal" standard when a litigation-based waiver of the right to remove is asserted. The conflict described by Maremont simply does not exist.

1. Third Circuit case law clearly embraces the same standard advocated by Maremont. Indeed, Maremont acknowledges as much in its Petition, citing to *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991). Pet. 9 at n.4). In *Foster*, the Third Circuit agreed that a litigation-based waiver of the right to remove must be clear and unequivocal. *Id.* at 1217-18 n.15 (distinguishing litigation-based waiver from the contractual-based waiver at issue in the case); *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 163 (3d Cir. 2000). As the Eleventh Circuit, discussing *Foster*, explained:

> [T]he cases that have applied [the "clear and unequivocal"] standard have arisen when the removing party participated in actions in the state court prior to removal that might be interpreted as a waiver of the right to remove. Such litigation-based waivers must be distinguished from the contractual waivers at issue in this case and in *Foster*. In the context of litigation-based waivers, the clear and unequivocal standard makes sense.

Snapper, Inc. v. Redan, 171 F.3d 1249, 1261 (11th Cir. 1999). There is, in short, no conflict between the decisions of the Third Circuit and those of other courts.

Maremont's petition is premised upon the argument that a single sentence from the Panel's summary Order granting Mrs. St. John's motion to remand on the basis of procedural defects in the Notice of Removal will be interpreted as a rejection of the Third Circuit's own precedent which holds that a litigation-based waiver of the right to remove must be "clear and unequivocal." This premise is unfounded. Like the other circuit courts, the Third Circuit adheres to the "clear and unequivocal" test.

2. Further, the District Court's waiver ruling (which is effectively the ruling of which Maremont seeks review) applied the proper test. Although the District Court did not expressly cite the "clear and unequivocal" test, the opinion adhered to this standard. Maremont maintained throughout the District Court proceedings that, based upon *Foster*, among other

cases, a waiver must be "clear and unequivocal." Mrs. St. John did not challenge the standard or argue that a different one applied. Rather, she called the court's attention to cases finding a clear and unequivocal waiver where a defendant, following the accrual of a right to remove, takes some substantial affirmative action in state court, indicating a willingness to litigate in the state forum. That is, she argued that the waiver had been "clear and unequivocal."

The District Court's written decision granting Maremont's motion to stay reflects this standard and relies on cases that apply it. Pet. App. 6a-7a (citing *Estate of Krasnow v. Texaco, Inc.*, 773 F. Supp. 806 (E.D. Va. 1991); *JP Morgan Chase Bank, N.A. v. Smith*, 2008 WL 2943369 (D. N. J.)). For example, in *Estate of Krasnow*, the court stated that a "waiver must be clear and unequivocal," 773 F. Supp. at 808, and concluded that, by awaiting the state court's decision on a demurrer before removing, the defendant demonstrated a clear and unequivocal intent to waive its right to remove. *Id.* at 809. The District Court below also cited *Wright and Miller, Federal Practice and Procedure* § 3721 (3d ed.2008), for the point that "a state court defendant may lose or waive the right to remove the case to a federal court by taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court." Pet. App. 7a.

Maremont parts company, not with the legal standard applied by the District Court, but with its

application of the facts of this case to that standard. That application, however, manifests no conflict among the appellate courts. Moreover, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

B. The Court of Appeals Did Not Decide an Important Question of Federal Law

Maremont also argues that the Third Circuit's Order "decide[s] an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10(c). Again, this argument is based on Maremont's failure to recognize that the Third Circuit remanded because Maremont filed a procedurally defective Notice of Removal, which it did not cure within 30 days after the case became removable. The Third Circuit did not hold that Maremont waived its statutory right to remove by participating in jury selection because that issue had not yet been briefed. That being said, even if the Third Circuit's remand order had been based on Maremont's waiver of its removal right, the concerns raised by Maremont are overstated and do not raise any important question of federal law.

1. Maremont states that "this Court historically has taken a particular interest in ensuring that the standards for removal to federal courts are applied evenly across the country." Pet. 18. Yet the cases Maremont cites are irrelevant to that proposition,

instead addressing jurisdictional issues. Most of the cases cited by Maremont concern appellate jurisdiction to review a remand order. See *Carlsbad Tech., Inc.*, *supra*, __ U.S. __ , 129 S. Ct. 1862; *Powertex Corp.*, *supra*, 551 U.S. 224 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). One case questioned whether federal jurisdiction was destroyed where a claim is barred by the Eleventh Amendment, *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381 (1998), and another commented on the need to establish a consistent practice in dealing with questions of subject matter jurisdiction, holding that the party alleging federal subject matter jurisdiction has the burden to demonstrate its existence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936). The only case which considers the right to remove is *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). There, the Court established a bright-line rule to resolve the conflicts among the Circuits over when, following initiation of a removable state court action, the 30-day time period to remove begins to run. See *id.* at 347.

In any event, because the standard applicable here is undisputed - by the parties or the lower courts - the petition does not implicate the Court's interest in removal standards.

2. Maremont also contends that the standard applied by the district court was inconsistent with Maremont's "absolute" federal right to remove and that "[a] federal right of this importance cannot be waived" by participating in state court jury selection. Pet. 14.

This contention is contrary to the principles of strict construction afforded to removal statutes and at odds with established case law. Indeed, this contention cannot be reconciled with the "clear and unequivocal" test that Maremont itself advocates, which recognizes that the right to remove may be waived.

"Statutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed . . . ." *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1094-95 (10th Cir.2005) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)). Because the right to remove is statutory in origin, it "must be invoked in strict conformity with statutory requirements." *Lupo v. Human Affairs Intern, Inc.*, 28 F.3d. 269, 274 (2d. Cir. 1994). "Removal is a statutory right, and the procedures must be followed." *Lewis v. Rego Comp.*, 757 F.2d 66, 68 (3rd Cir. 1985). It is beyond question that the right to remove a case under 28 U.S.C. § 1441(b) can be waived. *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990).

C. The District Court's Ruling Will Not Spur Fraudulent Joinders.

Without explaining how the district court's waiver ruling could trigger such a result, Maremont predicts an escalation of fraudulent joinders if the circumstances here are held to result in waiver. Pet. 20-21. This flawed argument is rooted in the notion that, had Maremont disclosed its intention to remove prior to participating in jury selection, the Plaintiff would have quickly joined

another non-diverse defendant before the removal papers were filed. *See* Pet. 16 (discussing *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 429 (5th Cir. 2003)).

First, the suggestion assumes that counsel would be indifferent to its Rule 11 obligations and fraudulently join an inappropriate defendant. Second, a plaintiff who has finally been able to bring a case to trial will be exceedingly reluctant to add a new party, which would reopen discovery and cause delay. Third, a plaintiff would require leave of the trial court to add a new party so late in the case, and it is inconceivable that the court would allow a new party to be added in the course of trial under the circumstances posited by Maremont.

Finally, courts are sensitive to the danger of fraudulent joinders. By way of example, the Fifth Circuit in *Tedford*, *supra*, developed a remedy to deal with a fraudulent joinder that occurred at the outset of the litigation. There, shortly after filing the complaint and well-before trial, a plaintiff attempted to defeat removal based on diversity jurisdiction by naming a non-diverse defendant in the action, after the diverse defendant notified the plaintiff of its intention to remove. *Id.* at 428. The plaintiff then post-dated a Notice of Nonsuit for the benefit of the non-diverse defendant but did not file it with the court or notify the diverse defendant until the one-year period in which a defendant may remove based upon diversity had passed. *Id.* The court did not countenance this conduct. Rather, it rejected the plaintiff's efforts to prevent removal and vindicated the defendant's right to remove

by extending the one-year time period to remove:

> Where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended. The facts of this case present just such a circumstance.

Id. at 428-29.

It is, in sum, exceedingly unlikely that an attorney would or could fraudulently join a party in the short hiatus between the time a party informs a court of its decision to remove and perfects that removal.

IV. MAREMONT WAIVED ITS RIGHT TO REMOVE BY PARTICIPATING IN JURY SELECTION WHILE REMAINING SILENT ABOUT ITS PLAN TO REMOVE

Our courts strive to prevent defendants from gaining an unfair advantage by "testing the waters" in state court before removing to federal court. In this case, the District Court not only followed the proper legal standard–"clear and unequivocal"–it correctly applied that standard to the facts, thus finding that Maremont waived its right to remove during the state court trial.

"[T]he spirit of the removal acts . . . do not contemplate that a party may experiment on his case in

the state court, and, upon an adverse decision, then transfer it to the federal court." *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893). The Third Circuit has similarly observed that the privilege of removal is susceptible to abuse by defendants "'testing the waters' in state court prior to removing to the federal district court." *Com. of Pa. v. Newcomer*, 618 F.2d 246, 252 (3d Cir. 1980).

Maremont and the other defendants filed their Notice of Removal to federal court when, after exercising most of their peremptory challenges, they became dissatisfied with the emerging jury. The District Court recognized removal at this point was inappropriate, explaining:

> It was incumbent upon Defendants to notify the state court and ask for a brief adjournment as soon as they began contemplating removal. Even if their request had been denied, merely asking would have preserved the right. But Defendants did not ask . . . . Maremont did not tell the state court of its plans until six hours later, after it filed for removal. During those six intervening hours, Defendants simultaneous[ly] prepared their removal documents and continued with jury selection. This course of action enabled Defendants to evaluate the potential jury pool and then decide whether or not to remove.

Pet. App. 7a.

The cases relied on by the district court support this ruling. *See also, e.g., Mancari v. AC & S*, 683 F.Supp. 91, 94 (D. Del. 1988) (quoting *1A Moore's Federal Practice* ¶ *0.157[9]*) ("Where the action becomes removable shortly before, at, or during the trial, the defendant may remove the case, but he must take prompt steps to do so, if his right is to be preserved; and, unless he does so, proceeding to or continuing with the trial constitutes a waiver of the right of removal, even though the thirty day period may not have elapsed."); *Waller v. American Tel and Tel*, 684 F. Supp. 475 (S.D. Tex. 1988); *Chicago Title & Trust Co. v. Whitney Stores, Inc.*, 583 F.Supp. 575 (N.D. Ill. 1984); *Waldron v. Skelly Oil Co.*, 101 F. Supp. 425, 426 (E.D. Mo.1951) ("[W]hen a case becomes removable during the process of a trial, the right to remove may be waived by proceeding with the trial without objection, but if timely objection is made the record is preserved and what happened thereafter does not prevent removal.").

Conversely, the cases relied on by Maremont are distinguishable. For instance, in *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57 (4th Cir. 1991), the Fourth Circuit first observed that a waiver determination involves a factual and objective inquiry, which would warrant reversal only if the lower court ruling was clearly erroneous. *Id.* at 59. In reviewing the district court's denial of the remand motion, the Fourth Circuit noted that although the removing defendant continued to seek summary judgment immediately following dismissal of the last non-diverse defendants during the motion proceeding, the removing attorney did not go to

the hearing with any knowledge that the non-diverse defendants might be dismissed. *Id.* The court also pointed out that the defendant did not take any substantial affirmative steps in the state court after the case became removable and had already filed its summary judgment motion before the case was removable. *Id.*

Importantly, the Court also recognized that the plaintiff seeking remand

> point[ed] to several factors that might have supported a contrary finding of fact as to [the defendant's] intent in participating as it did in the state court proceeding. *Had the court found differently, we likely would have been compelled to affirm that finding as not clearly erroneous; but that was not its finding, and the one made was, as indicated, a plausible one that we may not reject.*

Id. at 59-60 (emphasis added).

Rothner v. City of Chicago, 879 F.2d 1402 (7th Cir. 1989), cited by Maremont, is also distinguishable. There, the court found that the city-defendant did not waive its right to remove by opposing the plaintiff's motion for a temporary restraining order to prevent the city from enforcing an allegedly unconstitutional ordinance. *Id.* at 1418-19. Shortly after commencing the case, plaintiff filed an application for a temporary restraining order, which was argued and decided on the same day. The court of appeals held that the "district

court's decision was, by the court's own admission, against the long-settled rule that opposing a motion for a temporary restraining order in state court does not waive the right to remove." *Id.* The court also criticized the district judge's ruling as a "'poorly disguised' vehicle to effect a discretionary remand" where such was contrary to case law. *Id.* at 1408.

Maremont's reliance on *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998), is likewise misplaced. There, the plaintiffs argued that removal was improper because one defendant "was barred from consenting to removal because it had previously filed a motion for summary judgment in state court[.]" *Id.* However, since the case was not clearly removable when the motion was filed, the court ruled that, absent adequate notice of the right to remove, a defendant is not barred from the right of removal just because it defends itself in the state court forum. *Id.* Notably, the defendant's summary judgment motion had not yet been decided when the case was removed. *Id.*

Most importantly, in the cases Maremont cites, the alleged waivers all occurred well *before* trial commenced, not *during* the trial. Here, once Maremont learned that the case was removable, they actively participated in jury selection without advising the trial court that it was preparing a Notice of Removal. Thus, Petitioner and the other Defendants were able to evaluate the composition of the jury before making a final decision on removal. "Testing the waters" of the jury pool before removing is precisely the kind of state court "experiment[ation]" this Court denounced in

Rosenthal, *supra*, 148 U.S. at 147, more than a century ago.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD C. LAKIND
Counsel of Record
MARK A. FISHER
SZAFERMAN, LAKIND,
BLUMSTEIN & BLADER, P.C.
101 GROVERS MILL RD.
SUITE 200
LAWRENCEVILLE, NJ 08648
(609) 275-0400

MOSHE MAIMON
LEVY PHILLIPS &
KONIGSBERG, L.L.P.
101 GROVERS MILL RD.
SUITE 200
LAWRENCEVILLE, NJ 08648
(609) 275-0400

Counsel for Respondent
Florence Diane St. John

December 10, 2009

Supreme Court, U.S.
FILED
DEC 22 2009
OFFICE OF THE CLERK

No. 09-568

IN THE

Supreme Court of the United States

MAREMONT CORPORATION,

Petitioner,

v.

FLORENCE DIANE ST. JOHN, Individually and as Administratrix ad Prosequendum of the Estate of HAROLD ST. JOHN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

JOHN C. CANONI
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
JAMES P. YOUNG
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

December 22, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page..

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION... 1

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS 1

II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL 6

III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Akin v. *Ashland Chem. Co.*, 156 F.3d 1030 (10th Cir. 1998) 5
Carlsbad Tech. Inc. v. *HIF Bio, Inc.*, 129 S. Ct. 1862 (2009) 3
Grubb v. *Donegal Mut. Ins. Co.*, 935 F.2d 57 (4th Cir. 1991) 5
Heniford v. *Am. Motors Sales Corp.*, 471 F. Supp. 328 (D.S.C. 1979) 5
Johnson v. *Celotex Corp.*, 701 F. Supp. 553 (D. Md. 1988) 5
Rothner v. *City of Chi.*, 879 F.2d 1402 (7th Cir. 1989) 5
Tedford v. *Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003) 9

STATUTE

28 U.S.C. § 1447 9

INTRODUCTION

Petitioner demonstrated that the decision below conflicts with decisions of other courts of appeals on the legal standard that governs whether a defendant has waived the statutory right to remove a case to federal court. Respondent's opposition fails to show otherwise. Respondent cannot overcome petitioner's showing that the decision below wholly undermines not only a defendant's statutory entitlement to remove a diversity case to federal court, but also the purposes of federal diversity jurisdiction. In addition, respondent does not and cannot refute petitioner's showing that the petition presents an issue of national importance because of the need to ensure that the standard for waiver is applied evenly across the country and to ensure that defendants in cases that become removable due to changed circumstances during litigation are not deprived of the right that Congress expressly granted them to a federal forum.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner demonstrated (Pet. at 7-13) that the decision below merits review because it conflicts with the decisions of other courts of appeals on the legal standard that governs whether a defendant has waived its right to removal. Respondent's attempts to reconcile and harmonize these decisions and to show that a circuit conflict is not implicated in this case are unavailing.

1. There is no merit to respondent's assertion that "[t]he Third Circuit did not decide the waiver

issue set forth in Maremont's Question Presented." Opp. at 7. As petitioner demonstrated, and respondent does not dispute, the *sole* basis on which the district court remanded the case was its finding that petitioner had waived its right to remove. See Pet. at 5-6. Accordingly, the Third Circuit's statement that it was remanding the case "for essentially the reasons provided by the District Court," Pet. App. 1a, can only mean that it summarily affirmed the district court's waiver ruling.[1]

Respondent's contrary assertion that the Third Circuit granted the motion to remand "based upon a procedural defect in Maremont's Notice of Removal" is at odds with the court of appeals' order. See Opp. at 1. Again, the court of appeals expressly stated that it was granting the remand "for essentially the reasons provided by the District Court," Pet. App. 1a, and those reasons solely concerned waiver. Indeed, the district court *never addressed* the "procedural defect" issue because respondent failed to raise that issue in the district court. Respondent's suggestion (Opp. at 7) that the Third Circuit's explicit adoption of the district court's reasoning can be construed as a reference to an issue that the district court did not decide is simply untenable. Therefore, the issue

---

[1] Although the waiver issue was never formally briefed in the Third Circuit, *see* Opp. at 5, 7, 12, the parties' papers on the motion for remand that the Third Circuit granted put before the court of appeals all the facts pertinent to the waiver issue, through attached declarations and other exhibits including the transcript of the telephonic hearing conducted by the district court.

posed in the petition for certiorari is squarely presented in this case.[2]

2. Petitioner demonstrated that no other court of appeals would find waiver in the circumstances posed in this case because other courts of appeals uniformly have held that mere participation in state court litigation does not constitute a waiver; instead, the defendant must affirmatively waive its right to removal in a "clear and unequivocal" manner. Pet. at 7-9. Respondent does not dispute that other courts of appeals, as well as numerous district courts, apply the "clear and unequivocal" standard to determine whether a litigation-based waiver of the right to removal has occurred. Instead, respondent asserts that "Third Circuit case law clearly embraces th[is] standard" and that the courts below applied it here. Opp. at 9-10.

Respondent's attempt to argue that the courts below applied the "clear and unequivocal" standard is unpersuasive. As respondent concedes, "the District Court did not expressly cite the 'clear and unequivocal' test," Opp. at 10, and the Third Circuit certainly did not do so. Nonetheless, respondent asserts (*id.* at 11) that the district court's decision

---

[2] Because respondent erroneously characterizes the Third Circuit's remand order as based on a defect in removal procedure, there is no merit to her suggestion that this Court lacks jurisdiction to review that order. *See* Opp. at 7-8. As petitioner demonstrated, *see* Pet. at 6 n.2, the Third Circuit had appellate jurisdiction because the district court's "purely discretionary" order to remand based on waiver is within the class of orders that this Court found to be subject to appellate review in *Carlsbad Technology Inc.* v. *HIF Bio, Inc.*, 129 S. Ct. 1862, 1866 (2009). Accordingly, this Court has jurisdiction to review the Third Circuit's summary affirmance of the district court's order.

"reflects this standard," because the district court cited some opinions in which the proper standard was mentioned. But that is a far cry from showing that the standard was applied below. Moreover, a finding of waiver on the facts in this case is irreconcilable with the "clear and unequivocal" standard. Petitioner did not manifest an intention through affirmative actions or statements to remain in state court and forego the federal forum; to the contrary, its actions – an immediate effort to confirm the basis for, and file, a notice of removal, which it accomplished within less than six hours – revealed a "clear" and "unequivocal" intent to *assert* its removal rights.

The Third Circuit's holding therefore represents a sharp departure from the legal standards applied by other courts of appeals. Accordingly, even though other panels of the Third Circuit have referred in the past to the "clear and unequivocal" standard, the holding here is not faithful to that standard.

3. Having conceded that other courts of appeals uniformly apply the "clear and unequivocal" standard, respondent asserts that the Third Circuit's holding here is consistent with that standard because "the relevant distinction is between those cases that address the consequences of a waiver claimed to have occurred prior to trial, and those that address the consequences of a waiver claimed to have occurred during trial." Opp. at 8; see also *id.* at 20 (asserting that petitioner's cases all involved alleged waivers that occurred "well *before* trial commenced, not *during* the trial").

To be sure, courts applying the "clear and unequivocal" standard consider the defendant's conduct in light of the procedural posture of the case. Petitioner, however, in fact demonstrated (Pet. at 12) that the Third Circuit's finding of waiver here is at

odds with other cases *that involved alleged waivers during trial.* See *Heniford* v. *Am. Motors Sales Corp.*, 471 F. Supp. 328, 335 (D.S.C. 1979) (no waiver where defendant learned of removability during closing argument, but did not state intention to file for removal until the afternoon of the following day); *Johnson* v. *Celotex Corp.*, 701 F. Supp. 553, 556 (D. Md. 1988) (no waiver where defendant learned of removability after weeks of trial, but did not notify the court of its intent to remove until the following day). Respondent fails to address either of these *trial-stage* cases in her opposition, presumably because the courts declined to impose the instantaneous advance notice requirement that the Third Circuit imposed here, with the result that the defendants in *Heniford* and *Johnson* did not lose their removal rights, as petitioner will if the decision below is allowed to stand.

Respondent's attempt (Opp. at 18-20) to distinguish other cases cited by petitioner is unavailing. Petitioner demonstrated (Pet. at 10-11) that *Grubb* v. *Donegal Mutual Insurance Co.*, 935 F.2d 57 (4th Cir. 1991), *Rothner* v. *City of Chicago*, 879 F.2d 1402 (7th Cir. 1989), and *Akin* v. *Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), are all cases in which other courts of appeals held that defendants did not waive their removal rights merely by participating briefly and defensively in state court proceedings while they explored the possibility of removal. Indeed, the defendant in *Grubb* – much like petitioner here – participated in a hearing at the outset of which the case became removable for the first time and did not seek removal until a later date. Still, the Fourth Circuit held that such participation "did not show a 'clear and unequivocal' intent to waive its [removal] rights." *Grubb*, 935 F.2d at 58-59.

Respondent fails to show how the findings of no waiver in *Grubb*, *Rothner*, and *Akin* can be reconciled with the Third Circuit's contrary holding here.

These cases make plain that if petitioner's removal petition had been filed in another circuit, its statutory right to removal would not have been forfeited by its mere participation in jury selection, while it was diligently making certain that it could assert its removal rights. This sort of disparate outcome based on geography is intolerable and this Court should grant certiorari to prevent it.

II. THE COURT OF APPEALS' WAIVER STANDARD FAILS TO VINDICATE DEFENDANTS' "ABSOLUTE" FEDERAL RIGHT TO REMOVAL.

Petitioner also demonstrated (Pet. at 13-18) that the "clear and unequivocal" standard for waiver applied by other courts of appeals is the only standard that is faithful to the removal statute. In contrast, as petitioner demonstrated, the court of appeals' harsh standard – under which it found that petitioner waived its removal right notwithstanding the fact that it diligently *asserted* and *pursued* that right by promptly confirming the basis for removal and by preparing and filing a removal petition over the course of a few hours – is inconsistent with the deadlines in the removal statute (*id.* at 14-15); undermines the important interests protected by removal (*id.* at 16-17); and conflicts with the standard that federal courts use to determine waiver of federal statutory rights, such as the right to arbitration (*id.* at 17-18).

Respondent fails to respond to any of these points. Instead, respondent rebuts an argument petitioner never made: that the statutory right to removal

cannot be waived. Opp. at 13-14. Petitioner expressly acknowledged that "the right to removal, like virtually all other rights, can be waived." Pet. at 7. What petitioner did argue (and demonstrate) is that a federal right of this importance cannot be waived "through inadvertence or a few hours' silence by counsel," and instead can only be lost through affirmative actions or statements that manifest a clear intention to remain in state court. *Id.* at 14. Here, petitioner's swift filing of a notice of removal in federal court plainly belied any such intention.

Respondent also suggests that the court of appeals' standard and holding in this case are consistent with federal courts' recognition that the removal statute does not contemplate defendants "testing the waters" in state court and removing only when the state proceedings are not going well for them. Opp. 16-17, 20-21. In particular, respondent asserts that this is what petitioner did here. *Id.* at 20 (alleging that petitioner "evaluate[d] the composition of the jury before making a final decision on removal"). This speculative assertion, however, does not accord with the undisputed facts. As petitioner demonstrated and respondent does not dispute, jury selection was far from complete when petitioner's notice of removal was filed and, indeed, was *never* completed in this case, even though the state trial court continued with jury selection *after* receiving notice that the case had been removed. Pet. at 4, 16.[3] Accordingly, petitioner did not have a "compos[ed]" jury to evaluate at the time it filed for removal. In any event, the speed with which petitioner investigated the facts supporting

---

[3] Respondent does not dispute that after petitioner became satisfied that the case could be removed because all remaining parties were diverse (after lunchtime around 1 p.m.), its counsel did not participate further in jury selection. *See* Pet. at 4.

removal and drafted the necessary papers belies any notion that it lingered for strategic reasons.

III. THE COURT OF APPEALS' WAIVER RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Finally, petitioner demonstrated (Pet. at 18-21) that the court of appeals' waiver ruling poses an "important question" of federal law because the specific removal issue presented here is one that frequently arises in diversity cases and because this Court historically has steadfastly tried to ensure that federal courts address removal issues in a consistent manner.

Respondent makes no attempt to rebut petitioner's showing that courts often have to address potential waiver issues in cases that were not initially removable, but later became removable through new developments, such as settlements and changes in the parties. Pet. at 19-20. Indeed, as petitioner demonstrated, the recurring nature of this issue has been recognized by Congress. *Id.* at 19.

Petitioner further demonstrated that the recurring nature of this scenario is increased by the widespread practice of fraudulent joinder by plaintiffs. *Id.* at 20-21. As petitioner showed, this practice would only be encouraged if defendants are not able to eliminate such fraud through removal at whatever point the fraud comes to light, even if that is not until well into the pre-trial or trial proceedings. *Id.* This, however, is precisely what would happen under the Third Circuit's waiver standard because it gives rise to inadvertent losses of removal rights. Respondent fails to address this argument, asserting only that plaintiffs are unlikely to engage in fraudulent joinder to re-establish diversity that has been

destroyed, "in the short hiatus between the time a party informs a court of its decision to remove and perfects that removal." Opp. at 16. Regardless of how prevalent fraudulent joinder is in that particular circumstance – and such fraudulent joinder to thwart a removal petition did in fact occur in *Tedford* v. *Warner-Lambert Co.*, 327 F.3d 423, 427-28 (5th Cir. 2003), as respondent acknowledges (Opp. at 14-15) – petitioner raises broader concerns about fraudulent joinder that plaintiffs accomplish through their complaints and other conduct. Respondent has no answer to these concerns or to petitioner's showing that inadvertent waiver in the face of fraudulent joinder, as would occur under the Third Circuit's standard, should not be countenanced.

Respondent also fails to counter petitioner's showing (Pet. at 18-19) that this Court traditionally has granted certiorari to ensure uniformity on issues of federal procedure, such as removal. See Opp. at 13 (acknowledging that this Court repeatedly has addressed the procedures that govern removal, the scope of removal jurisdiction, and the provisions in the removal statute, 28 U.S.C. § 1447, that address appellate review of remand orders). The Court has previously done so to prevent uneven application of the removal statute in different circuits, which results in divergent outcomes, and should do so once again here.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. CANONI
KASOWITZ, BENSON,
TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
(212) 506-1700

CARTER G. PHILLIPS*
JACQUELINE G. COOPER
JAMES P. YOUNG
RICHARD E. YOUNG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

December 22, 2009

* Counsel of Record